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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 892

MAGNA OIL CORPORATION, et al.

Petitioners,

v.

PHILIP B. BATESON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on August 11, 1969, as modified by per curiam opinion filed on October 23, 1969, on Petition for Rehearing.(1)

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix B hereto, on page 12 is not yet reported.

(1) The Petitioners are as follows: Magna Oil Corporation, G. B. Howell, Vernon C. Howell, Jake B. Goodson, Richard E. Howell, and C. L. Vickers.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1969. R. 127; p. 12 *infra*. Rehearing was denied on October 23, 1969. R. 128; p. 19 *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a stockholder who sold his stock and shortly thereafter reacquired stock in the corporation for the purpose of filing a long-planned stockholder's derivative suit has standing to maintain the suit under Rule 23.1 of the Federal Rules of Civil Procedure. (2)

2. Whether the mere allegation that alleged past wrongs are "continuing" can give a United States Court jurisdiction pursuant to Rule 23.1 of the Federal Rules of Civil Procedure over a stockholder's derivative suit for transactions alleged to have occurred prior to stock ownership.

3. Whether a United States Court is required to apply Section 327 of the Delaware Corporation Law (1967) in a stockholder's derivative suit in which jurisdiction is based on diversity of citizenship, and the corporation is a Delaware corporation.

STATUTES INVOLVED

The statutory provisions involved are Rule 23.1 of the Federal Rules of Civil Procedure, and Section 327 of the General Corporation Law of Delaware. They are printed in Appendix A.

STATEMENT OF THE CASE

Prior to May, 1967, Respondent was a stockholder of Peti-

(2) This is a quotation of the question with which Judge Thornberry opened his opinion. (R. 126 p. 1; Appendix B, p. 12 *infra*)

tioner Magna Oil Corporation, a Delaware corporation whose shares of common stock are listed on the American Stock Exchange (R. 26) with 3,043,618 shares outstanding as of March 14, 1967 (R. 23, 67, 68). Commencing at least as early as April of 1966, Petitioner planned a stockholder's derivative action for the wrongs alleged in this action (R. 68). On May 5, 1967, Respondent disposed of the last of some 4200 to 4300 shares of stock in Petitioner Magna Oil Corporation which he had theretofore owned (R. 74), and as of May 5, 1967, Respondent was not a stockholder of Magna Oil Corporation (R. 74, 75). On July 21, 1967, Respondent ordered from a broker 100 shares of stock in Magna Oil Corporation which he paid for on August 18, 1967 (R. 76-78). The 100 shares of stock of Magna were purchased for the purpose of bringing the present suit (R. 68). On September 1, 1967, Respondent received a stock certificate for 100 shares of Common Stock of Magna Oil Corporation (R. 63), the only stock of Magna Oil Corporation owned by Respondent 20 days thereafter, on September 21, 1967, when he filed this lawsuit (R. 78). Jurisdiction was based solely on diversity of citizenship, as Petitioner Magna Oil Corporation is a Delaware corporation with its principal place of business in Texas, all other Petitioners are Texas residents, and Respondent is a New York resident. Thereafter timely motions to dismiss, based on Rule 23.1 of the Federal Rules of Civil Procedure were filed by the various Petitioners with briefs and affidavits attached, in accordance with Rule 12 of the Federal Rules of Civil Procedure, (R. 38-42) and additional material was permitted to be filed pursuant to Rule 12 and Rule 56 (R. 65). Such motions to dismiss were set for hearing on March 1, 1968, on which date the Court indicated its intention of entering an order of dismissal. At such hearing Respondent requested leave of court to file an amended complaint in order to allege that the wrongdoings of which he complained were "con-

tinuing wrongdoings" and the court indicated that Respondent could reduce his motion to writing and it would be overruled. Thereafter, on March 20, 1968, an order granting Petitioners' motion to dismiss was entered by the United States District Court for the Northern District of Texas, (R. 105) and Respondent's motion for leave to amend, with a proposed amended complaint attached, filed on March 20, 1968, which alleged only that an amended complaint would assert the wrongs to be continuing, (R. 78-80) was overruled (R. 105).

The alleged wrongdoings are set out in the lower court's opinion (p. 13 *infra*), except that contrary to the opinion there is no allegation that any Company assets secure personal indebtedness of any Petitioner (R. 92-24 R. 12-14). In its proposed Amended Complaint attached to its motion for leave to amend Respondent included an allegation of violation of 15 U.S.C.A. §78p, against Petitioner G. B. Howell, (R. 91) although not described in the motion for leave to amend, but of course this allegation could at most affect Petitioner G. B. Howell and would have no effect on any of the other Petitioners. The lower court mentioned this allegation in its footnote 1, but did not make it the basis of the decision for which review is sought.

The Court of Appeals treated the proposed amended complaint as having been filed and dismissed by the trial court and reversed the decision of the United States District Court for the Northern District of Texas and remanded the case to the trial court for proceedings not inconsistent with its opinion. The reversal was based on the theory that a former stockholder may acquire stock for the purpose of litigation and by the assertion that there were continuing wrongs not be barred by Rule 23.1.

REASONS FOR GRANTING THE WRIT

1. Although the judgment below is not a final one, it is

appropriate for review because it involves an issue fundamental to the further conduct of the case. *Land v. Dollar*, 330 U.S. 731, 735 n.2 (1947); and see *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). If review is not permitted, Petitioners will be deprived of their right to be free from purchased litigation or speculation in wrongs done to corporations prohibited by Rule 23.1 of the Federal Rules of Civil Procedure. It would appear that the right claimed by Petitioners under Rule 23.1 is "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated", *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). (3)

2. The decision of the Court of Appeals below is directly in conflict with the decision of the Third Circuit Court of Appeals in *Kenrich Corp. v. Miller*, 377 F.2d 312 (3rd Cir. 1967). Although the Court of Appeals for the Fifth Circuit recognizes the universal rule that a litigant who buys stock with knowledge of alleged wrongs may not maintain a derivative action based on these wrongs, it holds that a former stockholder who sells his stock with knowledge of the alleged wrong is not barred from reacquiring stock for the purpose of bringing litigation. The Court used the following language in reaching that result:

> "While a *stranger* to the corporation who buys stock with knowledge of the alleged wrongs may not maintain a derivative action even if the wrongs complained of are continuing wrongs, that rule is not applicable here. Appellant is no stranger to the corporation. He was a long-time

(3) As recognized by this Court in *Cohen v. Beneficial Industrial Loan Corp., supra*, the defense of litigation such as this is expensive and the "nuisance" value of the "strike" suit can make the derivative action a form of legal blackmail. If Rule 23.1 is not applied early in the litigation to protect the parties from litigants without standing, most of its value is dissipated.

> stockholder of Magna who apparently was concerned with the management of the company, and had planned to bring a derivative suit as early as April, 1966. Although it is true that he sold his stock (allegedly through inadvertence), he bought back a hundred shares in the corporation shortly thereafter." (At Appendix B, p. 16, R. 126, p. 7.)

In *Kenrich Corp. v. Miller, supra,* a long-time shareholder, former president and chief executive officer of a corporation sold his stock and later attempted to maintain an action on behalf of the corporation by assignment from the corporation of the cause of action. The Third Circuit described the effect of the sale of stock by such shareholder as follows:

> "One who is a stockholder at the time of an alleged intra-corporate wrong and, knowing of the wrong, thereafter sold his stock has in legal contemplation become a stranger to any controversy about the matter." 377 F. 2d 314.

The lower court in describing the *Kenrich* case, seems to indicate that the distinction in cases is the fact that what was involved in *Kenrich* was the *sale* of stock, and the present case involves a former shareholder who *buys* stock with knowledge of alleged wrongdoing. However, the present case also involves a party who sold his stock with knowledge of the wrongdoings. The court below recognizes that the purchase of stock in order to bring litigation bars standing to sue, but in direct conflict with the Third Circuit in the *Kenrich* case holds that former ownership of stock and sale does not make the former shareholder a "stranger", but gives a litigant who acquires stock for the purpose of litigation a standing not otherwise obtainable. Although the former shareholder in *Kenrich* had an alternative ground upon which he based his standing to sue (a champertous agreement), it was also necessary for the Court to find that no rights as a shareholder remained to one who sells his stock, in order to bar the suit.

3. The decision of the court below is believed to be in conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Weinhaus v. Gale*, 237 F.2d 197 (7th Cir. 1956) and the United States Court of Appeals for the Third Circuit in *Henis v. Compania Agricola de Guatemala*, 210 F.2d 950 (3rd Cir. 1954) affirming and adopting the decision of the United States District Court for the District of Delaware in *Henis v. Compania Agricola de Guatemala*, 116 F. Supp. 223 (U.S. Del. 1953). In each of the cited cases a party by the device of employing appropriate language in his complaint charged transactions which had previously occurred were "continuing transactions" in order to maintain jurisdiction within the meaning of Rule 23.1 of the Federal Rules of Civil Procedure and the Courts refused to permit this device to be successful. Each of the alleged wrongs set forth in Respondent's original complaint and described in the opinion below are wrongs which occurred prior to the time he acquired his 100 shares of stock, and only by the device of alleging that such wrongs were "continuing" was standing asserted. The position of the Fifth Circuit in the present case has been rejected by the Seventh Circuit and by the Third Circuit on the grounds that in this sense every wrong is a "continuing wrong" until it is remedied and if Rule 23.1 may be defeated by use of appropriate language in the complaint, the Rule is meaningless.

4. Although the sole basis of the jurisdiction of the United States Courts is diversity of citizenship the lower court wholly failed to apply substantive law of Delaware, the State of incorporation of Magna and the applicable substantive law. *McQuillen v. National Cash Register Co.*, 112 F.2d 877, 882 (4th Cir. 1940) *cert. den.* 311 U.S. 685. This Court has never answered the question of whether Rule 23.1 or applicable State laws control, but it is submitted that the plaintiff in a diversity

action choosing to use the federal court, should meet the tests of both laws, treating Rule 23.1 as procedural and Section 327 of the General Corporation Law of Delaware (1967) as substantive. This would be the only rule that would prevent "forum shopping". *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938). In this case state and federal laws are the same, and should bar Respondent's suit.

5. The decision of the court below with respect to the standing of a plaintiff who purchased 100 shares in order to commence litigation for alleged wrongs done to a corporation after having sold all his shares in such corporation with knowledge of such wrongs, is erroneous and in conflict with every authority which has considered this question. The court below cited no authority for the proposition. The holding is not only contrary to federal authorities cited above, but is directly contrary to *Gresov v. Shattuck Denn Mining Corp.*, 243 N.Y.S.2d 760 (N.Y. Sup. 1963) and the rationale of all of the Delaware authorities (the applicable substantive state law) applying what is now Section 327 of the General Corporation Law of Delaware, formerly Section 51A of the Delaware Code. See *Rosenthal v. Burry Biscuit Corp.*, 60 A.2d 106 (Del. Ch. 1948); *Maclary v. Pleasant Hills, Inc.*, 109 A.2d 830 (Del. Ch. 1954); and *Newkirk v. W. J. Rainey, Inc.*, 76 A.2d 121 (Del. Ch. 1950). Further, the rationale of the court below is in conflict in principle with the exposition of the meaning of the requirements of Rule 23 of the Federal Rules as set forth by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) in which this Court described Rule 23 as follows:

> "Rule 23 requires the stockholder's complaint to be verified by oath and to show that the plaintiff was a stockholder at the time of the transaction of which he complains or that his share thereafter devolved upon him by operation of law. In other words, the federal court will not

> permit itself to be used to litigate a purchased grievance or become a party to speculation in wrongs done to corporations." (337 U.S. 556)

The position that a former stockholder has a greater right to speculate in the wrongs of corporations than does a person who never owned stock at all, seems logically indefensible.

6. The question presented is of importance to the administration of the Federal Rules of Civil Procedure. In view of recent decisions particularly by lower United States Courts, stockholder derivative suits have become increasingly numerous and the whole subject of director liability is one which is occupying the attention of the public and the bar. Illlustrative of the growing interest in such litigation are the numerous law review articles on subjects such as director liability, and insurance against such liability. A partial list of some recent articles is set forth in Appendix C. The decision of the lower court constitutes a significant and important interpretation of Rule 23.1 of the Federal Rules of Civil Procedure and by granting this petition this Court may resolve the conflicts in the Circuits and clarify Rule 23.1 in the context of an undisputed fact situation, uncluttered by a record burdened with the unrelated merits of the alleged cause.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 26, 1969.

APPENDIX A

Rule 23.1, Federal Rules of Civil Procedure

Rule 23.1. Derivative Actions by Shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Section 327, Delaware General Corporation Law

Stockholder's derivative action; allegation of stock ownership

In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which he complains or that his stock thereafter devolved upon him by operation of law.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26130

PHILIP B. BATESON,
Plaintiff-Appellant,

versus

MAGNA OIL CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

(August 11, 1969)

Before THORNBERRY and SIMPSON, Circuit Judges, and CASSIBRY, District Judge.

THORNBERRY, Circuit Judge: The question presented is whether a stockholder who sold his stock and shortly thereafter re-acquired stock in the corporation for the purpose of filing a long-planned stockholders' derivative suit has standing to maintain the suit under Rule 23.1 of the Federal Rules of Civil Procedure. We hold that he does.

Appellant filed a stockholders' derivative suit on behalf of Magna Oil Corporation against the directors of the corporation. He seeks recovery for the benefit of the corporation for damages resulting to the corporation from alleged acts of fraud, mismanagement, conspiracy, and breach of fiduciary duty on the part of the defendant directors. Appellant complained of six transactions, five of which are alleged to be continuing transactions begun before the filing of the action and continuing at the time of the filing of the suit.[1]

The five transactions that are alleged to be continuous in nature are: (1) That defendant Howell caused Magna to advance him money on open account and promissory note. (2) That defendant Howell caused Magna to buy an airplane which is used more for the benefit of Howell than for the Corporation. (3) That defendant Howell has caused Magna to pay him and his brother excessive salaries and expense allowances. (4) That defendant Howell has caused the Corporation's property to be mortgaged at a nearly prohibitive rate in order to secure the payment of Howell's personal indebtedness. (5) That defendant Howell has caused certain of Magna's oil and gas properties to be mismanaged.

Appellant owned several hundred shares of Magna stock continuously from 1956 to May 5, 1967. On the latter date all of his Magna stock was sold. Appellant stated in his deposition that he had intended to retain one or two hundred shares because "he had long since planned this suit." On July 21, 1967, appellant bought one hundred shares of Magna stock for the

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[1]The sixth transaction complained of involves insider short-swing profits and an alleged violation of the Securities Exchange Act of 1934. It has been held that since an action to recover insider short-swing profits may be brought "by the owner of any security," 15 U.S.C.A. § 78p, plaintiff need not allege that he was a stockholder at the time of the transaction complained of. *Blau v. Mission Corp.*, 2d Cir. 1954, 212 F.2d 77, cert. denied, 347 U.S. 1016, 74 S.Ct. 872, 98 L.Ed. 1138.

stated purpose of bringing this suit. He filed suit on September 21, 1967. The lower court dismissed the action, apparently on the basis that the "contemporaneous ownership" requirement of Rule 23.1 had not been met.[2] Appellant appeals that decision.

The Rule makes it clear that one who buys stock in the corporation cannnot maintain a stockholders' derivative suit if the wrongs complained of were completed before his acquisition of stock. However, where the complaint charged continuing wrongs, occurring at the time plaintiff owned stock, the complaint should not be dismissed on defendant's contention that the claims actually arose prior to the time plaintiff acquired his stock. 1 Barron & Holtzoff, *Federal Practice and Procedure* § 566, p. 303 (Wright ed. 1961); *Hoover v. Allen*, D.C.N.Y. 1960, 180 F. Supp. 263. In other words, the requirement that a shareholder must have owned stock at the time of the wrong of which he complains may be satisfied if the wrong is a continuing one; that is, if it "spans the plaintiff's ownership, or if new elements in a pattern of wrongful conduct occur after acquisition." Prunty, *Business Associations*, 35 N.Y.U.L. Rev. 1468 (1960).

This Court has set forth certain guidelines and tests for continuing transactions. In *Palmer v. Morris*, 5th Cir. 1963, 316 F.2d 649, the plaintiff charged the defendants with wrongdoing for certain transactions entered into prior to plaintiff's acquisition of the stock. It was alleged, however, that the company was still paying out sums of money pursuant to the earlier transactions and that these sums of money, both in the form of allegedly non-beneficial services for the company and in the

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[2]Rule 23.1 requires, inter alia, that in a stockholder's derivative action, the complaint shall allege "that the plaintiff was a shareholder . . . at the time of the transaction of which he complains." This requirement serves the dual purpose of preventing a collusive attempt to invoke federal jurisdiction, *Hawes v. City of Oakland*. 1882, 104 U.S. 450, 26 L.Ed. 827, and of preventing a person from buying a lawsuit.

form of allegedly exorbitant rentals, were still being made. The Court stated:

> Each of the counts . . . sufficiently stated the facts and circumstances touching on the alleged illegality of the payments currently being made so that these counts could not be dismissed as dealing only with transactions that had completely occurred and been terminated prior to plaintiff's acquisition of his stock. We are unable upon the basis of the record itself to determine that as a matter of law these counts failed to assert illegal conduct by the officers of the company subsequent to the acquisition of the stock by the plaintiff and at a time when he had a right to complain thereabout.

Id. at 650.

The matters complained of in the present case are not wrongs that have "completely occurred and been terminated prior to plaintiff's acquisition of his stock," and therefore, under the *Palmer* test, are continuing wrongs. Thus it would seem that appellant has met the requirement of owning stock at the time of the wrong complained of because the alleged wrongs were continuing at the time he re-acquired stock in Magna.

Appellees claim, however, that this suit was properly dismissed because appellant had knowledge of the alleged wrongs at the time he re-acquired his stock, and stock acquired with such knowledge cannot give standing to sue regardless of whether the allegedly wrongful acts were "continuing wrongs." In support of this argument, appellees place strong reliance on *Kenrich Corp. v. Miller*, 3d Cir. 1967, 377 F.2d 312, in which the court stated that one who was a stockholder at the time of an alleged intracorporate wrong and *sells* his stock with knowledge of the wrong loses any rights he may have had to bring suit in behalf of the corporation. That case, however, is not in point. There, the plaintiff had been the president and principal

stockholder in the company, but he had sold all of his stock two years before the suit was instituted. He sought to maintain the suit by way of an assignment from another stockholder, and there was a finding that the assignment was champertous. Clearly, there was strong reason for applying estoppel principles against that plaintiff, whose apparent purpose in maintaining the derivative suit was to gain personal profit.

Estoppel principles will also work to deny standing to a plaintiff who *buys* stock with knowledge of the wrongs of which he complains. *See, e.g., Von Schlemmer v. Keystone Life Ins. Co.*, 121 La.2d 987, 46 So. 991 (1908); *Wagner Electric Corporation v. Hydraulic Brake Co.*, 269 Mich. 560, 257 N.W. 884 (1934). While a *stranger* to the corporation who buys stock with knowledge of the alleged wrongs may not maintain a derivative action even if the wrongs complained of are continuing wrongs, that rule is not applicable here. Appellant is no stranger to the corporation. He was a long-time stockholder of Magna who apparently was concerned with the management of the company, and had planned to bring a derivative suit as early as April, 1966. Although it is true that he sold his stock (allegedly through inadvertence), he bought back a hundred shares in the corporation shortly thereafter. He bears no resemblance to the outsider who finds out about intracorporate misconduct and buys stock to foment litigation. Appellees' argument that appellant does not have standing to maintain this action loses sight of the purpose of Rule 23.1. That purpose is to prevent the federal court from being used to litigate purchased grievances or from becoming a party to speculative suits against corporations. *Cohen v. Beneficial Industrial Loan Corp.*, 1949, 337 U.S. 541, 556, 69 S. Ct. 1221, 1230, 93 L.Ed. 1541. Certainly, it cannot be said that appellant is litigating a purchased grievance. He is not a speculative litigator. Therefore, it would exalt form

over substance to hold that appellant did not have standing to maintain this stockholders' derivative action. Appellant should have his day in court.

The order of the trial court dismissing the Complaint was erroneous and the order is VACATED and set aside. The case is REMANDED to the trial court for proceedings not inconsistent with this opinion.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 26130

D. C. Docket No. 3-2241-Civil Action

PHILIP B. BATESON,
Plaintiff-Appellant,

versus

MAGNA OIL CORPORATION, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY and SIMPSON, Circuit Judges, and CASSIBRY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and it is hereby remanded to the said District Court for proceedings not inconsistent with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

August 11, 1969

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26130

PHILIP B. BATESON,

Appellant,

versus

MAGNA OIL CORPORATION, ET AL,

Appellees.

Appeal from the United States District Court for the Northern District of Texas

ON PETITIONS FOR REHEARING

(October 23, 1969)

Before THORNBERRY and SIMPSON, Circuit Judges, and CASSIBRY, District Judge

PER CURIAM: It is ORDERED that the petitions for rehearing filed the above entitled and numbered cause be and the same are hereby denied, except that the first sentence of the first paragraph on page 5 of the slip opinion dated August 11, 1969, is modified to read as follows: "With the possible exception of transaction (1), the matters complained of in the present case are not wrongs that have 'completely occurred and been terminated prior to plaintiff's acquisition of his stock,' and therefore, under the *Palmer* test, are continuing wrongs."

APPENDIX C

Directors Liability and Indemnification

Adkins and Janis, *Some Observations on Liabilities of Corporate Directors*, 20 BUS. LAW. 817 (1965)

Anderson, *Directors and Officers Liability Insurance*, 47 CHI. BAR REC. 31 (1965)

Barker, *Coverage for Tort Liability of Officers, Directors and Stockholders*, 1967 ABA SEC. ON INS. N. & C.L. 413

Bishop, *Indemnification of Corporate Directors, Officers and Employees*, 20 BUS. LAW. 833 (1965)

Bishop, *New Cure For an Old Ailment: Insurance Against Directors and Officers Liability*, 22 BUS. LAW. 92 (1966)

Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078 (1968)

Brook, *Officers and Directors Liability Insurance*, 2 FORUM 228 (1967)

Cheek, *Control of Corporate Indemnification: A Proposed Statute*, 22 VAND. L. REV. 255 (1969)

Dyson, *Directors Liability For Negligence*, 40 IND. L.J. 341 (1965)

Hinsey and Delancey, *Directors and Officers Liability Insurance*, 23 BUS. LAW. 869 (1968)

Jennings, *Insider Trading in Corporate Securities: A Survey of Hazards and Disclosure Obligations* under Rule 10b-5, 62 NW. U.L. REV. 809 (1968)

Mace, *Directors and Officers Liability Insurance*, 85 BANKING L. J. 39 (1968)

McIntyre, *Directors and Officers Liability Insurance*, 42 LOS ANGELES BAR BULL. 57 (1966)

Riemer, *Personal Liability of Corporate Officer for Purchases Made without Disclosure of his Representative Capacity*, 72 COMMERCIAL L.J. 5 (1967)

Sebring, *Recent Legislative Changes in the Law of Indemnification of Directors, Officers and Others*, 23 BUS. LAW. 95 (1967)

Snow, *Liability of Directors and Officers of Corporation*, 17 DEFENSE L.J. 521 (1968)

Note, *Corporate Indemnification of Directors and Officers*, 18 CATHOLIC U.L. REV. 195 (1968)

Note, *Public Policy and Directors Liability Insurance*, 67 COLUM. L. REV. 716 (1967)

Note, *Insider Trading: The Issuer's Disposition of an Alleged* 16(b) *Violation*, 1968 DUKE L.J. 94

Note, *Liability Insurance for Corporate Executives*, 80 HARV. L. REV. 648 (1967)

Note, *Insider Liabilities Examined*, 18 SYRACUSE L. REV. 808 (1967)

Note, *Factors That Limit the Negligence Liability of a Corporate Executive or Director*, 1967 U. ILL. L. F. 341

Note, *Antitrust Laws and the Corporate Executive's Civil Damage Liability*, 18 VAND. L. REV. 1938 (1965)

Note, *Liability of Officers and Directors Who Continue the Business of a Corporation after the Forfeiture of its Charter*, 1967 WASH. U.L.Q. 222

Comment, 71 DICK. L. REV. 668 (1967)

Comment, 19 S.C. L. REV. 854 (1967)

Comment, 35 TENN. L. REV. 673 (1968)

Forum on Insurance against Liabilities of Directors and Officers, 22 RECORD OF BAR ASS'N OF CITY OF N.Y. 342 (1967)

Symposium on Duties and Liabilities of Corporate Directors, 22 BUS. LAW. 29 1966)

Stockholders Derivative Suits

Dykstra, *Revival of the Derivative Suit*, 116 U. PA. L. REV. 74 (1967)

Green, *Civil Liability to Stockholders Under the Securities Act*

of 1933 and Remedy by Class Action, 2 SAN DIEGO L. REV. 34 (1965)

Haudek, *Settlement and Dismissal of Stockholder's Actions*, 22 Sw.L.J. 767 (1968)

Hornstein, *Shareholder's Derivative Suit in the United States*, 1967 J. BUS. L. 282

Lowenfels, *Rule 10b-5 and the Stockholders Derivative Action*, 18 VAND. L. REV. 893 (1966)

Note, *Shareholder's Derivative Suit to Enforce a Corporate Right of Action Against Directors Under SEC Rule 10b-5*, 114 U. PA. L. REV. 578 (1966)